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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

**ViaSat, Inc.,**

*a Delaware corporation,*

Plaintiff

and Counter Defendant,

v.

**Acacia Communications, Inc.,**

*a Delaware corporation,*

Defendant

and Counter Claimant

Case No. 3:16-cv-00463-BEN-JMA

**ACACIA COMMUNICATIONS,  
INC.'S OPPOSITION TO VIASAT,  
INC.'S MOTION TO EXCLUDE  
EXPERT TESTIMONY**

**REDACTED**

Judge: Hon. Roger T. Benitez

Mag. Judge: Hon. Jan M. Adler

Date: March 5, 2018

Time: 10:30 a.m.

Courtroom: 5A

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## INTRODUCTION

Plaintiff ViaSat, Inc. (“ViaSat”) has filed a shotgun motion seeking to exclude various unrelated portions of the testimony of Defendant Acacia Communications, Inc.’s (“Acacia”) experts. In fact, ViaSat seeks exclusion on just about every point where it disagrees with Acacia’s experts. But ViaSat’s mere disagreement with their analysis is insufficient reason to strike their opinions, which are based on relevant technical and industry expertise. The Court should therefore deny ViaSat’s motion.

ViaSat’s motion challenges numerous discrete aspects of Acacia’s expert testimony, each of which is well within the respective expert’s expertise. (*See generally* D.I. 95-1 (“Mem.”)). None of ViaSat’s criticisms creates an issue of admissibility. *See Sec. & Exch. Comm’n v. Nutmeg Grp., LLC*, No. 09-1775, 2017 WL 1545721, at \*4 (N.D. Ill. Apr. 28, 2017) (denying plaintiff’s “scattershot approach to challenging [defendant’s expert’s] opinions as unreliable” as plaintiff’s “arguments leave only scratches on [defendant’s expert] for the purpose of its *Daubert* motion, not mortal wounds, and are the stuff of cross-examination rather than disqualification.”).

ViaSat first seeks to exclude the testimony of Dr. Alexander Vardy and Dr. Richard Koralek regarding their understanding of the term “Soft Decision Forward Error Correction (SDFEC) Core.” (Mem. at 3-9). ViaSat claims that Acacia’s experts exceeded the scope of their expertise by trying to reach a legal conclusion regarding the interpretation of the parties’ IP Core Development and License Agreement (“Agreement” or “Ag.”). They did not. Both Dr. Vardy and Dr. Koralek are experts in the communications industry, with particular expertise in error correction technology. (D.I. 95, Ex. 3 (“Vardy Rep.”) ¶¶ 8-24, Ex. A; D.I. 83, Ex. 24 (“Koralek Rep.”) ¶¶ 6-17, Ex. A). Both testified that the broad technical concepts that ViaSat now claims as its alleged trade secrets (“ATs”) are not “parts” of an SDFEC Core based on their technical understanding of SDFEC Cores, which is a common technical term in the industry. (Vardy Rep. ¶¶ 200, 245, 277, 308, 336, 358, 380; Koralek Rep. ¶¶ 119-126). Both experts made clear that their testimony was a technical opinion

1 based on understanding in the industry, **not** a legal conclusion regarding contract  
 2 interpretation, and would so testify to the jury. (Ex. 90 at 284:15-288:12; Ex. 91 at  
 3 170:13-171:14). ViaSat cannot exclude testimony regarding experts' own  
 4 understanding of a technical term used in their field on the sole basis that that term  
 5 also appears in a contract.

6 ViaSat next argues that Dr. Koralek's opinion regarding Acacia's non-use of  
 7 ATS 7 in the Accused Products should be excluded as "factually baseless." (Mem. at  
 8 11-14). ViaSat argues that Dr. Koralek abandoned his opinion that ATS 7 requires the  
 9 use of a mathematical concept called [REDACTED]. (*Id.*). But Dr.  
 10 Koralek did not abandon that position; on the contrary, he explained its factual basis,  
 11 including ViaSat's **explicit** inclusion of the principle in its trade secret identification.  
 12 (*See, e.g.*, Koralek Rep. ¶¶ 78-84). Moreover, ViaSat cannot exclude the multiple  
 13 alternative grounds Dr. Koralek provided for his opinions on ATS 7, based on its  
 14 challenge to a single, narrow ground relating to only part of his opinions on the ATS.

15 Third, ViaSat seeks to exclude Dr. Vardy's testimony, claiming that he  
 16 "parrot[s]" assertions of Acacia's fact witnesses, and presents legal conclusions  
 17 regarding trade secret protection. (Mem. at 14-17). ViaSat once again misconstrues  
 18 the testimony. Dr. Vardy applied his technical expertise to the facts of the case, which  
 19 included discussions with Acacia's engineers and review of technical documents, to  
 20 determine whether the ATSS were, in fact, secrets or generally known in the industry.  
 21 (Vardy Rep. ¶¶ 60, 89, 200, 245, 256-259, 277, 289-304, 308, 351-356, 358, 380). In  
 22 both cases, Dr. Vardy provides technical opinions based on facts, not legal opinions or  
 23 mere repetition of the testimony of others. Accordingly, ViaSat's motion is baseless.

24 Finally, ViaSat seeks to exclude the testimony of Mr. Brent Bersin on both  
 25 ViaSat's damages and Acacia's counterclaim damages. ViaSat claims that Mr. Bersin  
 26 used an improper legal standard to calculate ViaSat's unjust enrichment damages. But  
 27 as discussed below, Mr. Bersin properly relied on the parties' past dealings (as  
 28 embodied in the Agreement) to calculate the amount of unjust enrichment damages.

(D.I. 95, Ex. 10 (“Bersin Rebuttal Rep.”) ¶¶ 55, 56). ViaSat additionally challenges Mr. Bersin for failing to calculate reasonable royalty damages, even though he **agreed** with the reasonable royalty calculation of ViaSat’s damages expert. (*Id.* ¶ 90). In effect, ViaSat bizarrely suggests that the Court should exclude Acacia’s expert because he agrees on an issue with ViaSat’s expert.

Finally, as detailed below, ViaSat’s untimely production of documents and testimony regarding ViaSat’s revenues from its [REDACTED] project hindered Mr. Bersin’s formulation of an opinion regarding a portion of Acacia’s damages. In any event, in view of this late-produced evidence (some of which came only with ViaSat’s present motion), Mr. Bersin will not testify that [REDACTED]. Thus that portion of ViaSat’s motion is moot.

### **BACKGROUND**

Dr. Vardy holds the Jack K. Wolf Endowed Chair in Electrical Engineering at the University of California, San Diego, where he is also a Professor in the Department of Electrical and Computer Engineering and the Department of Computer Science and Engineering. (Vardy Rep. ¶ 8, Ex. A). Dr. Vardy teaches, researches, and publishes in the field of communications and error correction coding. (*Id.* ¶¶ 11-23, Ex. A). He provides technical opinions in his rebuttal expert report related to ViaSat’s ATSS 1-7, Acacia’s accused Sky, Denali, and Meru products, the Everest product created under the Agreement, and background information related to error correction in the communications industry. (*See id.* ¶¶ 28-382).

Dr. Koralek is the President of R K Consulting, Inc.. (Koralek Rep. ¶ 6, Ex. A). Dr. Koralek has researched, published, and patented inventions in the field of telecommunications and error correction coding. (*Id.* ¶¶ 13-15, Ex. A). He provides technical opinions in his rebuttal expert report related to ViaSat’s ATSS 2, 3, 4, and 7, Acacia’s accused products, Acacia’s Everest product and background information related to error correction in the communications industry. (*See id.* ¶¶ 21-127).

Mr. Bersin is a Certified Public Accountant, Certified Licensing Professional,

1 and Managing Director of Duff & Phelps, LLC. (D.I. 95, Ex. 12 (“Bersin Rep.”) ¶¶ 1-  
 2 4, Ex. A). He provides expert financial opinions regarding damages related to Acacia’s  
 3 counterclaims in his affirmative expert report (*see id.* ¶¶ 6-72), and expert financial  
 4 opinions regarding damages related to ViaSat’s claims in his rebuttal expert report. (*See*  
 5 Bersin Rebuttal Rep. ¶¶ 7-90).

6 Each of Acacia’s experts has testified based on their relevant expertise applied  
 7 to the facts of the present case.

## 8 ARGUMENT

### 9 **I. LEGAL STANDARD**

10 Expert testimony is admissible if:

- 11 (a) the expert’s scientific, technical, or other specialized knowledge will
- 12 help the trier of fact to understand the evidence or to determine a fact in
- 13 issue;
- 14 (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts

15 Fed. R. Evid. 702. Under Rule 702, the Court must undertake “the task of ensuring  
 16 that an expert’s testimony both rests on a reliable foundation and is relevant to the task  
 17 at hand.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). The Rules of  
 18 Evidence have a “liberal thrust.” *Id.* at 579. Rule 702 indicates a “strong and  
 19 undeniable preference for admitting any evidence having some potential for assisting  
 20 the trier of fact.” *Theranos, Inc. v. Fuisz Pharma LLC*, No. 11-5236, 2014 WL 12695908,  
 21 at \*2 (N.D. Cal. Mar. 10, 2014).<sup>1</sup> As a result, “rejection of expert testimony has been  
 22 the exception rather than the rule.” *Id.* A party may not strike an expert merely  
 23 because it disagrees with the substance of that expert’s testimony, and “[v]igorous  
 24 cross-examination, presentation of contrary evidence, and careful instruction on the  
 25 burden of proof are the traditional and appropriate means of attacking shaky but  
 26 admissible evidence.” *Daubert*, 509 U.S. at 596; *350 W.A. LLC v. Chubb Grp. of Ins.*, No.

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27  
 28 <sup>1</sup> Quotations and citations are omitted and emphasis is added, except as noted.

05-75, 2007 WL 4365502, at \*22 (S.D. Cal. Dec. 5, 2007).

## II. DR. VARDY'S AND DR. KORALEK'S OPINIONS REGARDING THE MEANING OF "SDFEC CORE" ARE ADMISSIBLE.

Dr. Vardy and Dr. Koralek are experts in error-correction codes for communications systems. (Vardy Rep. ¶¶ 8-24, Ex. A (discussing Dr. Vardy's qualifications); Koralek Rep. ¶¶ 6-17, Ex. A (discussing Dr. Koralek's qualifications)). They thus have specialized technical knowledge about the meaning of technical terms used in their field. Both Dr. Vardy and Dr. Koralek opine on the meaning of "Soft Decision Forward Error Correction (SDFEC) Core" in their respective rebuttal expert reports, which is a term that not only appears in the Agreement but also is commonly used in their field of expertise. (Vardy Rep. ¶¶ 55-57, 59-60; Koralek Rep. ¶¶ 119-121, 123-124; *see also* Ex. 90 at 282:22-286:14; Ex. 91 at 170:13-171:14).

ViaSat seeks to strike Dr. Vardy's and Dr. Koralek's opinions regarding the meaning of SDFEC Core as inadmissible legal conclusions. However, neither Dr. Vardy nor Dr. Koralek purports to interpret the contract. Rather, the experts provide a definition of a technical term based on their expertise and experience in the relevant technical field. An expert explaining his technical understanding of a technical term is not inadmissible merely because that technical term also appears in a contract. To the contrary, "in cases where the contractual language contains terms with specialized or technical meaning in a given industry, a qualified expert may assist the trier of fact by offering insight on the meaning of the language in the context of that industry." *Pacific Fuel Co. L.L.C. v. Shell Oil Co.*, No. 06-0225, 2008 WL 11336467, at \*5 (C.D. Cal. Jan. 24, 2008); *see also id.* at \*3 ("Expert testimony on terms of art, science, or trade is permissible because the specialized meaning of such terms is typically outside the knowledge and experience of the trier of fact, and expert testimony will be helpful to an understanding of such terms."). That is precisely what Acacia's experts did.

ViaSat also points to the alleged similarity of the passages regarding the meaning of "part" of an "SDFEC Core" in the reports of Drs. Vardy and Koralek to claim that

the passages do not represent their own expert opinions because they were prepared with the assistance of counsel. However, “assistance of counsel in the preparation of an expert report is not a proper basis upon which to exclude the expert’s testimony”; indeed, “[t]he advisory committee notes to the 1993 amendments to Rule 26 specifically provide for attorney assistance in the preparation of an expert report...” *United States ex rel. Jordan v. Northrop Grumman Corp.*, No. 95-2985, 2003 WL 27366249, at \*3 (C.D. Cal. Mar. 10, 2003). ViaSat has not offered any evidence showing that the passages in question reflect anything other than the expert opinions and analysis of Drs. Vardy and Koralek, and they both affirmed that these passages represent their own opinions. (*See* Ex. 90 at 282:22-286:14; Ex. 91 at 170:13-171:14). Nor has ViaSat disputed either of these eminent experts’ credentials. These passages therefore present the experts’ respective technical opinions accurately, and are admissible.

**A. Dr. Vardy’s Opinion Regarding the Meaning of “SDFEC Core” Is Admissible.**

As ViaSat admits, Dr. Vardy testified that he was providing a technical opinion, not a legal conclusion, regarding the meaning of “SDFEC Core.” (Mem. at 8-9).

(Ex. 90 at 284:15-285:6). When repeatedly asked whether he was interpreting the contract, Dr. Vardy made clear that he was not:

(*Id.* at 287:25-288:12; *see also id.* at 285:22-287:24). Dr. Vardy pointed out that his technical understanding of the meaning of SDFEC Core may relate to how it is used in the Agreement, but providing expert testimony as to the meaning of technical terms

relevant to contractual interpretations is not, as ViaSat seems to suggest, tantamount to offering a legal conclusion. The same is true for Dr. Vardy's technical analysis of whether particular technologies constitute "part" of an SDFEC Core. Dr. Vardy has applied his technical expertise and industry experience to a technical question that may relate to a contract, but expressly does not offer a legal conclusion. (*See* Vardy Rep. ¶¶ 200, 245, 277, 308, 336, 358, 380 (explaining based on industry expertise that the technical concepts claimed by ViaSat as its trade secrets are not "parts" of the SDFEC Core the parties developed as the word "part" is commonly understood in the field)).

**B. Dr. Koralek's Opinion Regarding the Meaning of "SDFEC Core" Is Admissible**

ViaSat's attack on Dr. Koralek is virtually identical. It again selectively quotes his deposition, to disguise his clear statements that he provides only a **technical** understanding regarding the SDFEC Core, not a legal conclusion. (Mem. at 6-7). Immediately prior to the responses cited by ViaSat, Dr. Koralek testified:

[REDACTED]

(Ex. 91 at 170:23-171:14; *see also id.* at 170:13-22). Like Dr. Vardy, Dr. Koralek acknowledged that there is a particular SDFEC Core at issue in this case. (*See id.* at 171:12-172:20; Ex. 90 at 300:25-301:5). However, Dr. Koralek's technical understanding of the term based on his industry expertise does not become an inadmissible legal conclusion merely because the term is also used in the contract; Dr. Koralek's technical opinions may be helpful to the factfinder in assessing the facts. *See Pacific Fuel Co. L.L.C.*, 2008 WL 11336467, at \*5.

ViaSat also claims that, in citing the deposition testimony of ViaSat's Chief Technology Officer Dr. William Thesling, Drs. Vardy and Koralek attempt to pass off lay witness testimony as expert opinion. (Mem. at 9 n.2). Drs. Vardy and Koralek cite

Dr. Thesling's testimony that Exhibit B to the Agreement captured the work done by ViaSat on the SDFEC encoder and decoder core. (Vardy Rep. ¶ 58; Koralek Rep. ¶ 122 (both citing Ex. 92 at 180:23-181:8, 182:5-19)). It is unclear whether ViaSat has correctly stated the law, because ViaSat attributes a quotation to its lone case that **does not actually appear in the case.**<sup>2</sup> Regardless, Acacia's experts are not seeking to pass Dr. Thesling's testimony off as their expert opinion. Instead, both Dr. Vardy and Dr. Koralek explained that Dr. Thesling's testimony "confirms" their expert opinions, based on documents they reviewed and their industry expertise. (Vardy Rep. ¶¶ 56-59; Koralek Rep. ¶¶ 119-123).

**C. ViaSat's Challenges Regarding the Meaning of "SDFEC Core" Go to Weight, Not Admissibility.**

As outlined above, the opinions expressed by Drs. Vardy and Koralek are not legal conclusions. To the extent ViaSat disagrees with Drs. Vardy and Koralek regarding the technical meaning of a "part" of an SDFEC Core, ViaSat may cross-examine them at trial and present evidence to try to contradict their opinions. ViaSat's criticisms at best go to weight, not admissibility. *See 350 W.A. LLC*, 2007 WL 4365502, at \*21 (where a party challenges the factual underpinnings of expert testimony "such weakness goes to the weight and credibility of the testimony"). Even if ViaSat presents significant criticisms of the conclusions drawn by Acacia's experts (though it does not, as discussed above), those criticisms are best left for the trier of fact as "objections to the content of the challenged opinions go to weight rather than admissibility." *Apple iPod iTunes Antitrust Litig.*, No. 05-37, 2014 WL 4809288, at \*4 (N.D. Cal. Sep. 26, 2014).

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<sup>2</sup> *See* Mem. at 9 n.2. inaccurately quoting *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1348-59 (Fed. Cir. 2007). Acacia has been unable to locate the quotation in that case, or in any case available on Westlaw or Google.

1 **III. DR. KORALEK'S OPINION THAT ACACIA**  
 2 **DOES NOT USE VIASAT'S ATS 7 IS ADMISSIBLE.**

3 **A. Dr. Koralek's Testimony Regarding the**  
 4 **Requirements of Alleged Trade Secret No. 7 Is Admissible.**

5 ViaSat disagrees with Dr. Koralek's testimony that ViaSat's ATS 7 requires [REDACTED]  
 6 [REDACTED]. (*See* Mem. at 10-14). It is free to argue this  
 7 point at trial, present evidence to the jury, and cross-examine Dr. Koralek , but Dr.  
 8 Koralek's testimony represents his informed expert opinion and is not "factually  
 9 baseless." (*Id.* at 11).

10 **1. ViaSat Ignores Most of Dr. Koralek's**  
 11 **Factual Bases for Determining That ATS 7**  
 12 **Requires Using "[REDACTED]."**

13 In fact, Dr. Koralek's expert opinion that ATS 7 requires the use of "[REDACTED]"  
 14 [REDACTED]" has a strong factual basis. Perhaps the clearest basis for  
 15 his opinion is ViaSat's own description of its trade secret:

16 [REDACTED]

17 [REDACTED]

(D.I. 95, Ex. 8 at No. 7). The table included in the ATS 7 description depicts [REDACTED] [REDACTED]. (Koralek Rep. ¶ 79). ViaSat concedes this point, but argues that the table is not **required** by ATS 7. (Mem. at 12).<sup>3</sup> Yet ViaSat's CTO Dr. Thesling, whom ViaSat identified as one of the developers of ATS 7,<sup>4</sup> (D.I. 93, Ex. 63 at No. 17), testified to the contrary. (See Ex. 92 at 243:2-20 (explaining that [REDACTED] [REDACTED])). Moreover, ATS 7, as implemented in the [REDACTED] [REDACTED]. (Koralek Rep. ¶¶ 81-82). ViaSat's position that the table is merely exemplary is disputed, not something that the factual record unequivocally proves. Dr. Koralek had a factual basis for understanding the requirements of ATS 7 based on ViaSat's own description and implementation of the trade secret. ViaSat is free to cross-examine him with allegedly contrary evidence.

Beyond that, Dr. Koralek testified that ATS 7 requires [REDACTED] [REDACTED] [REDACTED]. (Ex. 91 at 118:6-119:3; Koralek Rep. ¶ 80). This understanding comes from Dr. Koralek's own technical expertise and Dr. Thesling's testimony explaining the same. (Ex. 92 at 234:11-237:5). ViaSat claims that Dr. Koralek cannot rely on the "purpose" of the alleged trade secret to understand what is covered by it since "purpose" is not a required element to establish a trade secret. (Mem. at 13 n. 7). However, a trade secret must "derive independent economic value" from not being generally known. CAL. CIV. CODE § 3462.1(d). Where a concept does not possess any economic value, *i.e.* where it has no purpose, there is no trade

<sup>3</sup> ViaSat claims that Dr. Koralek conceded that the table in ATS 7 is merely exemplary. (Mem. at 12). He did not. When asked, [REDACTED] Dr. Koralek replied, [REDACTED] (Ex. 91 at 124:12-16, 19). ViaSat mischaracterizes Dr. Koralek's repeated explanation that [REDACTED] as a concession that the table contained t

<sup>4</sup> ATS 7 is Acacia's originally-identified ATS 9. (Compare D.I. 83, Ex. 21 with D.I. 83, Ex. 37).

secret protection. *See Direct Techs., LLC v. Elec. Arts, Inc.*, 836 F.3d 1059, 1071 (9th Cir. 2016) (affirming summary judgment of no trade secret misappropriation where plaintiff failed to “present[] any evidence that there was value in the secrecy of its design”); *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183, 1199 (S.D. Cal. 2008) (granting summary judgment on some alleged trade secrets where plaintiff “failed to raise a triable issue of material fact with respect to whether its [alleged trade secrets] derive independent economic value from not being generally known to the [relevant] industry”); *Steinberg Moorad & Dunn, Inc. v. Dunn*, No. 01-7009, 2002 WL 31968234, at \*24 (C.D. Cal. Dec. 26, 2002) (plaintiff could not “as a matter of law, present sufficient evidence to establish the essential elements of its trade secret misappropriation claim” where, among other things, plaintiff “presented no evidence that the information it claimed as trade secret derived independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use.”). Accordingly, Dr. Koralek properly considered the alleged purpose of the technical concept described in ATS 7.

ViaSat seeks to exclude Dr. Koralek’s testimony that ATS 7 requires the use of [REDACTED] while ignoring Dr. Koralek’s clear testimony that the table in ViaSat’s trade secret depicts [REDACTED], that the [REDACTED], and that the trade secret’s economic value derives from its use with [REDACTED]. (Koralek Rep. ¶¶ 79-82). ViaSat misleadingly excerpted Dr. Koralek’s deposition testimony on a single subsidiary point (*see* Mem. at 13-14), but that is insufficient to exclude the significant factual dispute created by Dr. Koralek’s consideration of many other factors to determine that ATS 7 requires [REDACTED].

## 2. ViaSat Mischaracterizes Dr. Koralek’s Testimony Regarding the ’837 Patent.

ViaSat misconstrues Dr. Koralek’s testimony regarding U.S. Patent No. 3,891, 837 (“the ’837 Patent”). (Mem. at 13-14). ViaSat claims that Dr. Koralek “conceded

1 that the '837 patent also [REDACTED]  
 2 [REDACTED]" (*Id.* at 13). ViaSat's ATS 7 requires using "[REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]" (D.I. 83, Ex. 21 at No. 7). In portions of his  
 5 deposition ignored by ViaSat, however, Dr. Koralek explicitly testified that the '837  
 6 patent has "[REDACTED]" (Ex. 91 at  
 7 192:2-3). He explained further that, "[REDACTED],"  
 8 as required by ATS 7 (*Id.* at 193:8-9). Dr. Koralek's testimony makes clear that the  
 9 '837 patent does **not** disclose the use of ATS 7 [REDACTED]  
 10 [REDACTED].

11 Also contrary to ViaSat's claim, Dr. Koralek did not "abandon[] the theoretical  
 12 basis for his opinion." (Mem. at 13-14). At most, in response to one question ViaSat  
 13 asked him about how a certain portion of the patent that was not addressed in his  
 14 report relates to his opinion, Dr. Koralek testified that [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]. (Ex. 91 at 194:3-14). Nothing in that response can  
 17 fairly be characterized as "abandoning" his clearly-stated opinions.

18 ViaSat's allegations regarding Dr. Koralek's testimony with respect to the '837  
 19 patent range are therefore insufficient to strike Dr. Koralek's expert opinions.

20 **B. ViaSat Cannot Exclude All of Dr. Koralek's**  
 21 **Opinions Regarding Acacia's Non-Use of**  
 22 **ATS 7 by Challenging One Narrow Portion.**

23 In yet another scattershot argument, ViaSat argues that **all** of Dr. Koralek's  
 24 testimony regarding Acacia's non-use of ATS 7 is inadmissible, based on only the  
 25 narrow issue discussed previously. Contrary to ViaSat's claim, Dr. Koralek's report  
 26 included several grounds for his opinion that Acacia's accused products do not use  
 27 ViaSat's ATS 7 beyond his contention that ATS 7 requires [REDACTED]  
 28 [REDACTED]. Those opinions would still be admissible even if his

1 opinion regarding [REDACTED] were not (although it is, as  
2 discussed above).

3 First, as ViaSat admits, Dr. Koralek testified that [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]. (Mem. at 12 n. 6; Ex. 91 at 146:8-147:22).

7 Second, Dr. Koralek explained that Acacia's accused products do not [REDACTED]  
8 [REDACTED] as required by ATS 7. (Koralek Rep. ¶¶ 88-90). Dr. Koralek pointed  
9 out that Dr. Hassoun inaccurately conflated [REDACTED] and  
10 thus failed to recognize that Acacia's products do not practice ATS 7. (*Id.*)<sup>5</sup>

11 Finally, Dr. Koralek explains that Dr. Hassoun failed to actually analyze what is  
12 implemented by the accused products by failing to review [REDACTED]  
13 [REDACTED]. (*Id.* ¶¶ 107-117). None of these opinions rests on Dr. Koralek's separate  
14 opinion that ATS 7 requires [REDACTED], and ViaSat cannot  
15 strike Dr. Koralek's opinions regarding non-use on one narrow ground that bears no  
16 relation to these other opinions. *See Area 55, Inc. v. Amazon.com, Inc.*, No. 11-145, 2012  
17 WL 12846975, at \*7 (S.D. Cal. July 24, 2012) (refusing to exclude "ultimate analysis"  
18 of expert opinion even though expert opinion on one subsidiary point was excluded).

19 **C. ViaSat's Challenge to Dr. Koralek's Report**  
20 **Again Goes to Weight, Not Admissibility.**

21 ViaSat and its experts may disagree with Dr. Koralek's opinions. (*See* Ex. 93 at  
22 209:18-212:19). That does not render them inadmissible. Dr. Koralek's testimony  
23 contradicts the testimony of ViaSat's expert Dr. Marwan Hassoun, presenting a classic  
24 "battle of the experts." Such battles are "not uncommon," and the decision of which  
25 expert is right is "best left for the trier of fact." *Regents of Univ. of Cal. v. Dako N. Am.*,

26 \_\_\_\_\_  
27 <sup>5</sup> ViaSat points to Dr. Koralek's testimony that, [REDACTED]  
28 [REDACTED]. (Mem. at 12, n.5). ViaSat ignores the fact that Dr. Koralek  
agrees only that an [REDACTED]  
[REDACTED]. (Ex. 91 at 139:15-140:24, 146:2-147:11).

1 *Inc.*, No. 05-3955, 2009 WL 1083446, at \*15 (N.D. Cal. Apr. 22, 2009).

2 ViaSat cannot prevent the jury from hearing from experts from both sides  
3 merely by insisting that Dr. Koralek is wrong. *See Silicon Labs, Inc. v. Cresta Tech. Corp.*,  
4 No. 14-3227, 2016 WL 836679, at \*4 (N.D. Cal. Mar. 3, 2016) (holding that a dispute  
5 about whether voltage across two input wires can be a single control signal creates “a  
6 classic ‘battle of the experts’ on a material issue of fact. It is the jury’s province to  
7 resolve such issues, not the court’s.”); *Hertz v. Luzenac Am., Inc.*, No. 04-1961, 2011  
8 WL 1480523, at \*7 (D. Colo. Apr. 19, 2011) (the differences between two specialized  
9 talc manufacturing processes “is a quintessential ‘battle of the experts’ in which cross-  
10 examination will be the testing ground for the jury”).

#### 11 **IV. DR. VARDY’S OPINIONS DO NOT** 12 **EXCEED THE SCOPE OF HIS EXPERTISE.**

13 ViaSat mischaracterizes Dr. Vardy’s report to allege that he offered opinions  
14 outside the scope of his expertise. He did not.

##### 15 **A. Dr. Vardy Does Not “Simply Parrot Assertions** 16 **by Acacia Fact Witnesses” as Expert Opinion.**

17 ViaSat first highlights small excerpts of Dr. Vardy’s report that it claims  
18 “parrot” Acacia’s fact witnesses. (Mem. at 14-16). In each of the paragraphs, Dr.  
19 Vardy refers to [REDACTED],  
20 that helped provide him with information relevant to his conclusions. (Vardy Rep. ¶¶  
21 60, 89, 200, 245, 277, 308, 336, 358, 380). Those conclusions, however, are his own.  
22 Dr. Vardy, applying his expertise to the documents he has reviewed as well as those  
23 conversations, understood that the earlier Everest product ViaSat helped design did  
24 not [REDACTED]  
25 [REDACTED]. (*Id.*) So Acacia [REDACTED]  
26 [REDACTED]. (*Id.*)

27 “[A]n expert may rely upon communications with fact witnesses in forming an  
28 opinion.” *Dane Techs., Inc. v. Gatekeeper Sys., Inc.*, Civ. No. 12-2730, 2015 WL 12819180,

1 at \*5 (D. Minn. Jan. 20, 2015). That is precisely what Dr. Vardy did. He used his  
2 communications industry knowledge to evaluate the need for Acacia to design a new  
3 product, and [REDACTED]. Dr. Vardy  
4 has specialized technical expertise regarding both the implementation of and market  
5 for error-correcting codes in communications products, and he applied that specialized  
6 knowledge to the facts of this case to reach his opinions.

7 Dr. Vardy's application of his expertise to the case's facts is not "uncritical  
8 acceptance of other evidence in the case," as ViaSat alleges (Mem. at 16), citing *Waymo*  
9 *LLC v. Uber Techs., Inc.*, No. 17-939, 2017 WL 6887043, at \*6 (N.D. Cal. Nov. 14,  
10 2017). In *Waymo*, the court struck an expert damages opinion from an inactive CPA,  
11 who merely multiplied two numbers on a document already in evidence, and added an  
12 unsupported assumption regarding the development time of trade secrets. *Id.* at \*5-6.  
13 Dr. Vardy, on the other hand, applied his technical expertise to the information he  
14 gathered from Acacia engineers and other documentary evidence, and performed his  
15 own expert analysis in reaching his opinions. (*See, e.g.*, Vardy Rep. ¶¶ 23, 56-60, 89).  
16 In particular, he considered the [REDACTED] attached  
17 as Exhibit B to the Agreement and the testimony of ViaSat's own fact witnesses and  
18 experts. (*Id.* ¶ 56, 60, 89).

19 ViaSat's other cases deal not with an expert's alleged uncritical acceptance of  
20 fact testimony already in evidence, but rather with the use of unreliable methods,  
21 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999), or lack of expertise in the  
22 appropriate technical field. *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356,  
23 1360-1362 (Fed. Cir. 2008). ViaSat does not challenge Dr. Vardy's opinions on those  
24 grounds. (*See* Mem. at 14-16). Instead, his opinions are based on knowledge in the  
25 relevant field, [REDACTED].  
26 They are thus admissible. ViaSat has not articulated a reason why the Court should  
27 strike them.  
28

ViaSat further argues that Dr. Vardy cannot have an expert opinion on [REDACTED] [REDACTED]. (*Id.* at 15-16). Dr. Vardy testified that Acacia [REDACTED] based on his understanding of the functions of the products at issue, and the industry demands and standards for those products. As discussed above, this opinion derives from the application of his expertise to the facts of the case. An expert opinion does not become inadmissible simply because there is other evidence that an expert could possibly have used. ViaSat may explore the fact Dr. Vardy [REDACTED] [REDACTED] at trial. But his conclusions are well within his expertise. (Vardy Rep. ¶¶ 8-24, Ex. A).

**B. Dr. Vardy Does Not Present Opinions About Trade Secret Protection Outside His Area of Expertise.**

ViaSat next turns to contending that Dr. Vardy's opinions regarding whether ViaSat has taken reasonable measures to maintain the secrecy of its alleged trade secrets are outside the scope of his expertise. (Mem. at 16-17). However, Dr. Vardy used his technical expertise appropriately to analyze technical documents, whether industry members would have access to those documents, and what they would understand those documents to disclose. (*See* Vardy Rep. ¶¶ 256-259, 261, 289-304, 306, 351-356). This analysis led Dr. Vardy to an understanding of what would be generally known in the industry, and whether reasonable efforts were taken to keep particular technical concepts present in the documents he reviewed secret. (*Id.*).

ViaSat cannot dispute (and does not dispute) that Dr. Vardy has relevant technical expertise in the communications industry. (*See* Vardy Rep. ¶¶ 8-24, Ex. A). Instead, ViaSat seeks a finding that experts must employ their expertise in a vacuum, and may not apply their expertise to the facts of the case. This is not the law. *See Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2316-17 (2016) (citing Fed. R. Evid. 702) ("an expert may testify in the 'form of an opinion' as long as that opinion rests upon 'sufficient facts or data' and 'reliable principles and methods.'"). Dr. Vardy was

well within his expertise in opining that certain technical concepts that ViaSat claims as trade secrets were generally known in the industry, and not kept secret by ViaSat.

**C. ViaSat’s Challenges to Dr. Vardy’s Report Go to Weight, Not Admissibility.**

As discussed above, Dr. Vardy’s report includes conclusions regarding which ViaSat may cross-examine him at trial. Its criticisms are directed at the weight of his testimony, not its admissibility. *See 350 W.A. LLC*, 2007 WL 4365502, at \*21; *Apple*, 2014 WL 4809288, at \*6-7.

**V. MR. BERSIN’S OPINIONS REGARDING VIASAT’S AND ACACIA’S DAMAGES ARE ADMISSIBLE.**

**A. Mr. Bersin Applied the Proper Legal Standard for Calculating Unjust Enrichment.**

ViaSat argues that Acacia’s damages expert, Brent Bersin, used an improper standard in reaching his opinion on ViaSat’s unjust enrichment claim. (Mem. at 18-20). To begin with, ViaSat ignores Mr. Bersin’s primary opinion on ViaSat’s unjust enrichment—namely that such damages are inappropriate because the foundation of ViaSat’s claims against Acacia is a dispute over whether Acacia owes royalty payments on particular products. (Bersin Rebuttal Rep. ¶ 55). Moreover, Mr. Bersin explained that the contract includes a limitation on liability clause that caps damages of any type at [REDACTED] in Section 13. (*Id.*).

Mr. Bersin nevertheless went on to present his analysis regarding the unjust enrichment value he would calculate if unjust enrichment were appropriate. As ViaSat’s damages Stephen Prowse recognized in his expert report, unjust enrichment is limited to Acacia’s profits “attributable to its misappropriation.” (D.I. 95, Ex. 11 (“Prowse Rep.”) ¶ 65). In performing his unjust enrichment analysis, Mr. Bersin applied the same standard, evaluating the gain that accrued to Acacia as a result of its alleged misappropriation. (Bersin Rebuttal Rep. ¶ 56-57). According to Mr. Bersin, that sum is best measured by the unpaid royalties allegedly due under the Agreement, since Acacia’s gain from (allegedly) using ViaSat’s technology without contractual

1 payment of royalties is precisely the amount it would otherwise have owed under the  
 2 contract. (*Id.*). Mr. Bersin looked to the single best evidence available to evaluate that  
 3 value: the royalty established in the arm's-length Agreement for those exact  
 4 technologies, entered into between these exact same parties, and agreed to outside the  
 5 context of any litigation or legal dispute. (*Id.*; Ex. 94 at 102:24-103:15).

6 ViaSat cites no cases to suggest that an expert cannot consider past negotiations  
 7 and agreements to determine unjust enrichment damages. (Mem. at 18-20). On the  
 8 contrary, where (as here) there is an actual, arm's-length agreement on the same issue  
 9 between the same parties, that agreement provides the best possible evidence of what  
 10 the technology in question was worth. For similar or, in this case, **identical**  
 11 technology, courts hold that previous royalty agreements are usually the single best  
 12 evidence for determining a reasonable royalty. *See Mobil Oil Corp. v. Amoco Chems.*  
 13 *Corp.*, 915 F. Supp. 1333, 1353 (D. Del. 1994)) ("Courts and commentators alike have  
 14 recognized that the royalties received by the patentee under prior and existing licenses  
 15 for patented technology is often the 'most influential factor' in determining a  
 16 reasonable royalty."); *Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 989 F. Supp.  
 17 547, 607 (D. Del. 1997) (same); *Magnetar Techs. Corp. v. Six Flags Theme Parks Inc.*, No.  
 18 07-127, 2014 WL 530241, at \*3 (D. Del. Feb. 7, 2014) (same); *see also Uniloc USA, Inc. v.*  
 19 *Microsoft Corp.*, 632 F.3d 1292, 1317-18 (Fed. Cir. 2011) ("looking at royalties paid or  
 20 received in licenses for the patent in suit or in comparable licenses... remain valid and  
 21 important factors in the determination of a reasonable royalty rate").

22 Although ViaSat suggests that there is a single determinative standard for  
 23 calculating unjust enrichment (Mem. at 18-19), courts hold otherwise: "There is no  
 24 standard formula to measure [unjust enrichment]." *Ajaxo Inc. v. E\*Trade Fin. Corp.*, 187  
 25 Cal. App. 4th 1295, 1305 (2010). Only "some reasonable basis for the computation" is  
 26 required. *Id.* In particular, "[a] defendant's unjust enrichment might be calculated  
 27 based upon [its] cost savings...." *Id.* Here, for the reasons discussed above, Mr.  
 28 Bersin used that approach suggested by *Ajaxo*: He testified that the royalty owed (i.e.

the cost savings from not paying that contractual royalty) is the best measure of any unjust enrichment that Acacia allegedly obtained. (Bersin Rebuttal Rep. ¶ 56-57). In appropriate cases, the “damages caused by misappropriation may be measured by imposition of liability for reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret.” See Ex. 95, *The Litigation Services Handbook: The Role of the Financial Expert*; Weil, Roman L.; Lentz, Daniel G.; Hoffman, David P. (6th ed. 2017). Hoboken, NJ; John Wiley & Sons, at 19.35. An expert performing such an analysis may find guidance from patent decisions “useful if the case involves a technical trade secret or otherwise resembles subject matter similar to that found in patents.” *Id.* A reasonable royalty can be based only on damages attributable to the misappropriation. See *VirnetX, Inc. v. Cisco Sys., Inc.*, No. 2013-1489, 2014 WL 4548722, at \*13 (Fed. Cir. Sep. 16, 2014) (“No matter what the form of the royalty, a patentee must take care to seek only those damages attributable to the infringing features.”).<sup>6</sup>

Consequently, Mr. Bersin reached – subject to his reservation that the sum in any event must be limited by the [REDACTED] contractual limitation on liability – the same [REDACTED] royalty calculation reached by ViaSat’s own damages expert. (*Compare* Bersin Rebuttal Rep. ¶ 90 with Prowse Rep. ¶ 94). Although ViaSat criticizes Mr. Bersin for doing “no quantitative analysis whatsoever” (Mem. at 19), a claim it immediately withdraws (*id.* n.12), there can be no basis to exclude testimony from Mr. Bersin on a point as to which he **agrees** with Dr. Prowse. Mr. Bersin used a proper legal standard for analyzing unjust enrichment, and performed accurate calculations in determining the proper damages amount under that standard.<sup>7</sup> Indeed, as he agrees

<sup>6</sup> ViaSat’s contention (Mem. at 20) that the value of its ATs increased when used later in Accused Products with **some** Everest-compatible modes, as compared to its previous use in royalty-bearing Everest products—which obviously have **only** Everest-compatible modes—is unsupported and illogical.

<sup>7</sup> ViaSat suggests that Mr. Bersin contradicts himself by looking to royalties as a measure of unjust enrichment damages for ViaSat’s claims, but not for Acacia’s counterclaims. (Mem. at 19). There is no contradiction. The Agreement provides a per-unit royalty rate for Acacia’s licensed use of ViaSat’s technology, which is relevant in evaluating unjust enrichment. (Ag. § 4(a)-(b)). But the Agreement contains no such

1 with ViaSat's witness on this point, it is hard to understand why ViaSat objects.

2 **B. ViaSat's Challenge to Mr. Bersin's**  
3 **Report Go to Weight, Not Admissibility.**

4 ViaSat's challenge to Mr. Bersin's report attacks the conclusions Mr. Bersin has  
5 drawn, not his methods. As discussed above, such challenges go to the weight of the  
6 testimony, not its admissibility. *See 350 W.A. LLC*, 2007 WL 4365502, at \*21; *Apple*,  
7 2014 WL 4809288, at \*6-7.

8 **C. ViaSat's Untimely Production of Relevant**  
9 **Documents and Testimony Regarding Revenues**  
10 **From Its [REDACTED] Hindered Mr. Bersin's Opinions.**

11 ViaSat's last attack is on Mr. Bersin's opinion regarding ViaSat's revenues and  
12 profits from its [REDACTED]. (Mem. at 21-24). However, Mr. Bersin's opinions  
13 were based on the evidence available when he wrote his report. ViaSat's own delayed  
14 production of relevant documents and testimony created the confusion that it now  
15 seeks to pin on Mr. Bersin.

16 ViaSat did not produce the final agreement related to each of its accused  
17 projects, including [REDACTED], until October 12, 2017, months after the close of paper  
18 fact discovery and the day before the close of fact depositions. (*See* Ex. 96; D.I. 59;  
19 D.I. 68). Even worse, ViaSat did not produce the relevant financial documents until  
20 **two days** before Mr. Bersin's report was due. (Bersin Rep. at ¶ 72 n.113). Notably,  
21 ViaSat did not produce the [REDACTED] agreement until **months after** Acacia deposed  
22 Russell Fuerst, ViaSat's corporate designee on its contracts and business issues. As a  
23 result, Acacia was unable to examine ViaSat's key witness regarding the [REDACTED]  
24 agreement, ViaSat's understanding of it, and how much it expected to get paid in  
25 [REDACTED] as part of that project.

26  
27 royalty rate for ViaSat's use of Acacia's technology. (*Id.*). ViaSat has also failed to sell  
28 a single commercial product to date as part of its four accused projects, (*See* D.I. 95,  
Ex. 17 at ¶¶ 26-27, 32-33, 37-38, 47-49). A per-unit royalty is an inappropriate  
measure of unjust enrichment damages where no units are sold.

1 ViaSat's expert Dr. Prowse then revealed at his deposition in late November  
 2 that he had spoken to Dr. Fuerst and relied on Dr. Fuerst's explanations of the  
 3 [REDACTED] project as part of reaching his conclusion that the [REDACTED]  
 4 [REDACTED]. (D.I. 95, Ex. 17 ¶ 41; Ex. 97 at 159:19-161:3). Mr.  
 5 Bersin did not have the benefit of any of this evidence, as ViaSat did not disclose this  
 6 evidence from Dr. Fuerst until long after Mr. Bersin's report was due.

7 Only with its present motion has ViaSat come forward with a declaration from  
 8 Dr. Fuerst explaining for the first time ViaSat's understanding of the [REDACTED]  
 9 agreement. (D.I. 95, Declaration of Dr. Russell Fuerst). ViaSat first disclosed this  
 10 evidence two weeks ago (on February 2, 2018), long after discovery closed and over  
 11 **six months** after Dr. Fuerst's deposition. ViaSat disclosed this evidence as part of  
 12 seeking to strike an expert's opinion that would have relied on that evidence. ViaSat  
 13 cannot strike an expert's opinion for lacking evidence that ViaSat itself withheld.

14 The face of the [REDACTED] agreement does not clearly state that [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]. (D.I. 95, Ex. 16 § 5.2). Therefore, without having access to Dr. Fuerst's  
 17 testimony on the [REDACTED] agreement, or sufficient time to analyze the [REDACTED] financial  
 18 documents prior to his opening report, Mr. Bersin presented alternative "High End"  
 19 and "Low End" analyses of Acacia's claimed damages, based on whether the [REDACTED]  
 20 [REDACTED], respectively.  
 21 (Bersin Rep. ¶¶ 6, 69). ViaSat has not criticized Mr. Bersin's "Low End" damage  
 22 calculation assuming a [REDACTED]. (See Motion at 22-24).

23 Mr. Bersin stated in his report that "my opinions are based upon my analysis of  
 24 the information available to date. I may review and consider additional information  
 25 that may be produced by the parties to this dispute." (Bersin Rep. ¶ 70).  
 26 Notwithstanding ViaSat's delayed production of extrinsic evidence regarding the  
 27 interpretation of the [REDACTED], in light of that evidence, [REDACTED]  
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[REDACTED]

[REDACTED]. Hence this portion of ViaSat's motion is moot.

**CONCLUSION**

For the above reasons, Acacia respectfully requests that the Court deny ViaSat's motion to exclude expert testimony.

Date: February 16, 2018

Respectfully Submitted,

WOLF, GREENFIELD & SACKS, P.C.

*By: s/Michael A. Albert*

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**CERTIFICATE OF SERVICE**

I certify that today I am causing to be served the redacted version of the foregoing document by CM/ECF notice of electronic filing upon the parties and counsel registered as CM/ECF Users. I further certify that am causing the redacted and unredacted versions of the foregoing document to be served by electronic means via email upon counsel for ViaSat, Inc., per the agreement of counsel.

Date: February 16, 2018

*s/Michael A. Albert*  
Michael A. Albert